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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

THE WESTERN UNION TELEGRAPH COMPANY, *Petitioner*,

v.

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, and the BELL SYSTEM OPERATING COMPANIES, *Respondents*.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Respondents, American Telephone and Telegraph Company ("AT&T") and the Bell System Operating Companies herein oppose the petition for a writ of certiorari filed by The Western Union Telegraph Company ("Western Union") on November 15, 1976.

QUESTION PRESENTED [1]

Whether the Court of Appeals erred in refusing to overturn the decision of the Federal Communications Commission ("FCC") (1) that under contracts between the Bell System and Western Union which will expire in 1978 Western Union may not lease facilities from the Bell System for Western Union's use in providing FX and CCSA services; and (2) that Western Union must instead obtain those facilities pursuant to tariffs under the same rates, terms and conditions as other carriers with whom it competes?

STATEMENT OF THE CASE

In 1970, Western Union and the Bell System renewed and modified long-standing contracts pursuant to which Western Union leases facilities for its use in rendering service to the public. Those contracts will expire in 1978. Until that time, Western Union desires to obtain facilities for its provision of so-called

[1] In its petition, Western Union sets forth a single question presented dealing solely with the lower court's review of the FCC's construction of the Bell System-Western Union contracts. However, Western Union claims in a footnote (p. 3 n. 4) that the question presented "is also applicable to the Commission's holding that Western Union waived its contract rights by accepting a domestic satellite grant." The Bell System does not concede that Western Union has properly sought certiorari with respect to the waiver issue by its footnote reference to this quite different question. Indeed, Western Union's argument as to the construction of the Bell System-Western Union contracts turns upon a supposed distinction between the deference due an administrative agency's construction of a contract and its resolution of other issues, such as the interpretation of its prior orders, which was the basis for the FCC's resolution of the waiver issue. In any event, the argument which the Bell System will advance concerning the contract construction issue applies, as the lower court held (Petn. 17a), *a fortiori* to the waiver issue.

FX and CCSA services [2] from the Bell System under the 1970 contracts, rather than pursuant to tariffs which the Bell System was ordered to file by the FCC and which set forth the rates that other carriers, including many of Western Union's competitors, must pay for their FX/CCSA facilities.

The present dispute has its origin in a series of FCC orders post-dating the 1970 agreements, which have substantially changed the nature of the domestic communications industry. In a major departure from prior regulatory policy and practice, the FCC in 1971 determined to authorize so-called "Specialized Common Carriers" ("SCCs") to engage in the provision of interstate common carrier private line service in competition with the Bell System and Western Union.[3]

In commencing operations, the SCCs provided only "point-to-point" (*i.e.* non-switched) private line service and required from the Bell System solely the local distribution facilities necessary to originate or terminate that service. Thus, at this stage of their operations the SCCs neither required nor sought connection with the Bell System's switched telephone network.

Later, however, some of the SCCs began demanding the right to offer FX and CCSA services. Although previously providing the SCCs with facilities necessary for their point-to-point services, the Bell System took the position that connection of the SCCs

[2] Western Union does not challenge the lower court's description (Petn. 4a n.1) of FX and CCSA services. See Petn. 5 n.7.

[3] *See* Specialized Common Carrier Services, 29 F.C.C.2d 870, *reconsideration denied*, 31 F.C.C.2d 1106 (1971), *aff'd*, Washington UTC v. FCC, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975).

with the switched public telephone network for switched services, such as FX and CCSA, would interfere with the planning and coordination necessary to insure efficient service via that network and would increase the costs associated with its operation.

Ultimately, the issue of SCC provision of FX and CCSA services via Bell facilities and through connection with Bell's switched public telephone network was resolved by the FCC, which on April 23, 1974, ruled that the Bell System should interconnect with the SCCs for their provision of FX and CCSA services. (46 F.C.C.2d 413). To implement this requirement, the FCC directed that the Bell System file interstate tariffs setting forth a schedule of charges for its provision of FX/CCSA facilities to other carriers and for its interconnection with them.

Up to this point in time, Western Union had not provided nor sought to provide FX/CCSA services. It had not sought to lease facilities from the Bell System under the 1970 (or earlier) contracts for this purpose, nor had it indicated a desire to interconnect with Bell switched services.

However, after the Bell System sought judicial review of the FCC's April 23, 1974, order, Western Union began to assert its right to provide FX and CCSA services. Subsequently, it registered an informal complaint with the FCC concerning the Bell System's refusal both to provide connections and to allow Western Union to lease facilities under the 1970 contracts for its provision of these services. (A. 23).

Prior to the FCC's ruling upon this complaint, its earlier order was affirmed. *Bell Telephone Co.* v. *FCC,* 503 F.2d 1250 (3d Cir. 1974), *cert. denied,* 422

U.S. 1026 (1975). Since that decision rested upon a rationale which was broad enough to mandate the Bell System's provision of FX/CCSA interconnections and facilities to Western Union and not merely the new SCCs, the Bell System agreed to permit Western Union to obtain facilities and to connect its services with Bell System switched services in the manner necessary to allow Western Union to provide FX and CCSA services. However, the Bell System took the position that Western Union must pay for these interconnections and facilities under the same tariffed rates applicable to the SCCs, rather than under the lower rates for facilities contained in the 1970 contracts, arguing that those contracts did not extend to Western Union's provision of FX/CCSA services.

On October 16, 1974, the FCC, acting on Western Union's complaint, handed down an order which recognized and affirmed that the Bell System was required by the April 23, 1974, order to provide facilities and to connect with Western Union to enable it to provide FX and CCSA services. (Petn. 64a). Declaring that for certain purposes Western Union was an SCC within the meaning of its earlier orders, the FCC held that

> "Thus Bell is obligated, pursuant to the Commission's Decision in *Specialized Common Carrier Services* [29 F.C.C.2d 870, 31 F.C.C.2d 1106 (1971)], to make available, on a non-discriminatory basis, its monopoly facilities to all carriers, including Western Union, for the provision of FX and CCSA services." (Petn. 65a).

The FCC was unable on the record then before it, however, to determine whether the rates for the facilities involved in providing FX and CCSA services

should be determined by the 1970 Bell System-Western Union contracts or whether the charges for such facilities should instead be determined by Bell's tariffs. Accordingly, the FCC directed the parties to brief this question.

Following the submission of copious briefs by both sides (A. 47, 65, 124, 137) bearing on construction of the 1970 contracts, the FCC on June 24, 1975, issued the final order underlying Western Union's instant petition. (Petn. 45a). After discussing the terms of the Bell System-Western Union contracts and other evidence bearing upon the intent of the parties, the FCC found that "Western Union may not obtain under the contracts facilities which would be used in the provision of FX and CCSA services," but instead must obtain such facilities "pursuant to Bell tariffs on file with this Commission, in the same manner and at the same rates as other common carriers offering FX and CCSA type services." (Petn. 57a).[4]

Unsatisfied with the decision (which Western Union's own complaint had precipitated) that it must pay the same tariff rates as other carriers for FX/CCSA facilities, Western Union filed a petition for review in the Third Circuit. In briefing and arguing the case, Western Union contended, in the lower court's words, that the FCC had "no particular expertise" with respect to the issue involved in the con-

[4] As to the facilities used in the provision of domestic satellite services, the FCC analyzed its prior orders and reaffirmed that "Western Union willingly and knowingly waived its contract rights [if any existed] when it accepted its authorization" for its own domestic satellite facilities. (Petn. 63a). Thus, here, too, Western Union was required to obtain facilities pursuant to Bell tariffs on file at the FCC rather than at preferential contract rates.

struction of the Bell System-Western Union contracts and that its decision was, therefore, "entitled to no greater deference from [that] court than would be due a district court in a breach of contract action." (Petn. 11a).

After analyzing the relevant sections of the Administrative Procedure Act and recognizing that "[t]hese agreements involve complex, sophisticated, and rapidly-evolving communications technology * * * * implicat[ing] questions of national regulatory policy" (Petn. 11a-12a), the Third Circuit rejected Western Union's argument and held that it would upset the FCC's construction of the contracts "only if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." (Petn. 12a). Then turning to an analysis of the several provisions of the contracts, the Court of Appeals refused to adopt Western Union's construction and concluded that the FCC's rejection of Western Union's position should not be set aside under the standard of review prescribed by the Administrative Procedure Act.

The petition for certiorari filed by Western Union in this Court complains that the Third Circuit did not review *de novo* the contractual issue decided by the FCC. It also seeks to have this Court so construe the contracts and render a decision which would enable Western Union to have the advantage until 1978 of contract, as opposed to tariff, rates for the lease of facilities used in its provision of FX and CCSA services. *See* Petn. p. 13 n.18.[5]

[5] Western Union in its petition relies heavily upon the dissenting opinion of Judge Garth below, which, based upon a *de novo* review of the issues decided by the FCC, concluded that the contracts

(footnote continued)

REASONS FOR OPPOSING THE WRIT

Western Union has failed to advance anything in its petition that would justify the exercise of this Court's certiorari jurisdiction. Certainly, the inherent significance of the dispute between Western Union and the Bell System and any attending considerations of equity are not such as to prompt this Court to grant review. The disputed contracts will terminate in 1978. Moreover, what Western Union has unsuccessfully sought from both the FCC and the Third Circuit is a construction of the contracts that would put it in a preferred position, vis-a-vis other carriers, in obtaining facilities from the Bell System for the provision of FX and CCSA services.

Just as the Bell System-Western Union dispute fails to raise any significant issues of national policy, it similarly fails to raise any legal issues commonly

did extend to Western Union's provision of FX and CCSA services. Because of the inappropriateness of this Court's exercise of its certiorari jurisdiction to resolve this issue, we will do no more here than point out that Judge Garth failed even to recognize many of the principal arguments advanced in support of the FCC's construction of the contracts—(1) that in 1970, when the contracts were renewed, Western Union was explicitly precluded from providing FX services by Bell System tariffs then in effect (A.61); (2) that the Bell System did not interconnect its switched services, such as are used in the provision of FX and CCSA services, with non-telephone communications common carriers, like Western Union, until the FCC's 1974 order; (3) that under Section 2(g) of one of the 1970 contracts (Petn. 74a) and Section 2(f) of the other 1970 contract (Petn. 91a), Western Union is prohibited from leasing facilities where they are available under tariff; and (4) that under Section 3(b) of the agreements (Petn. 75a, 91-92a) Western Union would require the written consent of the Bell System (which it neither sought nor obtained) to interconnect circuits in the manner necessary for the provision of FX and CCSA services and thus could not claim an open-ended obligation from the Bell System to make facilities available for FX/CCSA services.

recognized as a prerequisite to the exercise of this Court's certiorari jurisdiction. Instead, the position taken by Western Union in this Court rests solely upon its reading of the record of the proceedings underlying the FCC's June 24, 1975, order.

Western Union does not and cannot claim that no deference should ever be paid to an administrative agency's construction of a contract properly brought before it. A long line of judicial authority, both in this and in other courts, which mandates judicial deference to administrative agency adjudication of contract disputes,[6] as well as elementary precepts of primary jurisdiction,[7] prevent Western Union from taking any such broad legal position.

[6] United Gas Pipe Line Co. v. Memphis Light, Gas and Water Div., 358 U.S. 103, 114 (1958) (recognition of FPC's "special competence" in construing contract); Gunther v. San Diego & Arizona E. Ry., 382 U.S. 257 (1965) (deference due decisions of National Railway Adjustment Board which bring to "thorny problems" of contract construction expertise based upon knowledge of "the industry's language, customs, and practices"); NLRB v. Marcus Trucking Co., 286 F.2d 583 (2d Cir. 1961) (deference paid to NLRB's conclusion that a contract existed between the parties, notwithstanding the court's conclusion that evidence for the contract was "synthetic"); North Atlantic Westbound Freight Ass'n v. FMC, 397 F.2d 683, 685 (D.C. Cir. 1968) ("[c]ertainly where underlying issues of fact or policy are involved an agency's interpretation of agreements is due judicial respect and deference"); St. Petersburg Bank & Trust Co. v. Boutin, 445 F.2d 1028, 1033 (5th Cir. 1971) (deference paid to SBA's construction of ambiguous provision of a loan agreement).

[7] *See, e.g.*, Far East Conference v. United States, 342 U.S. 570, 574 (1952); Mississippi Power & Light Co. v. United Gas Pipe Line Co., 532 F.2d 412 (5th Cir. 1976) (recognizing the primary jurisdiction of the FPC to construe a contract between a pipeline company and one of its customers in the light of the FPC's general regulatory authority over and involvement in the natural

Instead, disagreeing with the lower court's assessment that the Bell System-Western Union agreements "involve complex, sophisticated, and rapidly-evolving communications technology" (Petn. 11a), Western Union contends that the issue before the FCC involved "a simple question of the interpretation of written agreements" (Petn. 8) and that "[n]o factors derived from FCC 'expertise' played any part whatsoever in the agency decision." (Petn. 9). Although its entire petition rests upon this proposition, Western Union relies upon nothing other than the force of its own assertions to establish this element of its argument.

Certainly, the FCC did not here "disavow . . . reliance on any special agency competence or expertise and profess . . . instead to be acting as would a court . . . " (Petn. 10), like the agencies whose orders were under review in the two decisions of this Court relied upon by Western Union in its petition. In *Texas Gas Transmission Corp.* v. *Shell Oil Co.*, 363 U.S. 263, 268 (1960), this Court was able to hold that

> "the record nowhere discloses that the Commission arrived at its interpretation of the [contract] . . . on the basis of specialized knowledge gained from experience in the regulation of the natural gas business . . . ."

There, the contract issue arose in a routine rate-making case in which the hearing examiner "concluded that

gas curtailment issues which gave rise to the contract dispute). Significantly, Western Union in its petition here does not quarrel with the Third Circuit's observation that, had Western Union not chosen the FCC as the forum to resolve its contract dispute with the Bell System and had it instead proceeded directly to federal district court, its action probably would have been referred to the FCC under the doctrine of primary jurisdiction. (Petn. 11a n.7).

'elemental principles of contract law . . . too commonly known to the legal profession to require citation in support thereof' compelled the decision he reached." (*Id.* at 269).

Similarly, in *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943), the SEC had explicitly "stated that it was merely applying 'the broad equitable principles enunciated' " in judicial precedents. This Court was thus able to hold that the SEC "purported to be acting only as it assumed a court of equity would have acted in a similar case." (*Id.*) In *Texas Gas, Chenery* and similar cases, where the agency has made clear by its action and its words that it is relying only upon general legal principles and that it is not in any better position than a court to articulate those principles, it may well be appropriate that a court review the agency's decision in the same manner that it would review the judgment of a trial court.[8]

This unexceptionable proposition, however, hardly supports the position which Western Union has taken in this case. As was recognized by both the lower court (Petn. 5a-6a) and by the FCC (Petn. 64a-67a; 45a-

[8] To be sure, the FCC did not explicitly refer to or discuss the expertise which it could bring to the resolution of the Western Union-Bell System contract dispute. But regulatory agencies seldom proclaim their own expertise in dealing with issues properly brought before them, yet courts regularly presume that it his been exercised absent express indication by the agency to the contrary. *See, e.g.*, FPC v. Florida Power & Light Co., 404 U.S. 453 (1972), where this Court affirmed an FPC decision (37 FPC 244 (1967)) based upon its expertise in analyzing scientific and engineering data, notwithstanding the FPC's failure to refer to that expertise. *Cf.* Gordon v. New York Stock Exchange, Inc., 422 U.S. 659 (1975), relying upon the SEC's expertise in regulating brokerage commissions in the light of its presumed familiarity with these matters.

57a), the FCC has been intimately involved in all of the matters giving rise to the instant dispute through its enunciation of the national regulatory policy bearing upon SCC and Western Union provision of FX/CCSA services; its issuance of prior orders defining the Bell System's obligation to assist these carriers in the provision of these services; its familiarity with the long course of dealing between Western Union and the Bell System, as most recently expressed in the 1970 version of their contracts; its jurisdiction over Bell System tariffs for the provision of facilities and connections involved in Western Union's and the SCC's provision of FX/CCSA services; etc. It was thus eminently qualified to pass upon the issues underlying construction of the Bell System-Western Union contracts.

That this is so is clearly revealed by Western Union's principal argument in support of its construction of the disputed contracts. Overridingly, that argument turned upon whether the parties had reference to the *status quo* of 1970 when they fixed Bell System's obligations to provide facilities to Western Union for interconnected services or whether instead they contemplated an open-ended obligation that would force the Bell System to provide facilities at contract rates to Western Union for any new (post-1970) interconnected services.

As indicated above (p. 7 n.5), there were a variety of arguments advanced by the Bell System which support the conclusion that the Bell System-Western Union 1970 contracts did not contemplate the open-ended Bell System obligation urged by Western Union. However, the FCC's rejection of Western Union's construction of one of the provisions of the 1970 agreement, Section 3(d) (Petn. 76a-77a), sufficiently demonstrates the expertise that the FCC brought to the Western Union-Bell System contract dispute.

Western Union contended that under Section 3(d) it was entitled to receive facilities for interconnected services, if, at any time after 1970, the Bell System filed tariffs with the FCC permitting such interconnection. The FCC rejected Western Union's construction of Section 3(d) as one which would render the section "superfluous," since

> "[i]f there were no Section 3(d) in the contract, then the terms and conditions governing the connection of Bell services with the services of other common carriers would be found in the then effective applicable Bell System customer tariffs." (Petn. 56a-57a).

Thus, under the FCC's view of the matter, for Section 3(d) to provide any meaningful role in defining the Bell System's obligations, the reference to "tariffs" in that section must be to those which were on file as of 1970 when the contracts were renewed, not those which might subsequently be filed by the Bell System. (Petn. 57a).

An examination of the opinions of the FCC and of the record upon which they were based clearly shows that the FCC was correct in construing Section 3(d) and other provisions of the Bell System-Western Union contracts as not extending to Western Union's lease of facilities for FX and CCSA services. But that is not really the point here.

What is determinative is that the Third Circuit both articulated and applied the applicable standard of

judicial review under the Administrative Procedure Act in declining to upset the FCC's construction of the contracts because it was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." (Petn. 12a). Given the FCC's special insight into the nature of the Western Union-Bell System dispute and its unique appreciation of the various factors bearing upon the conflicting constructions of the contracts urged by the parties, including its awareness of the obligations imposed upon the Bell System by its tariffs—the basis for the FCC's rejection of Western Union's construction of Section 3(d)—the record here clearly demonstrates the FCC's expertise in construing the contracts and supports the lower court's refusal to engage in the type of *de novo* review urged by Western Union.[9]

Thus, the essential premise underlying the *Texas Gas* and *Chenery* cases—that there was no basis in the record for assuming agency expertise—is absent here; the FCC's knowledge of the issues presented and its general expertise in this area are readily apparent. Certainly, in arguing that the record inadequately supports the deference paid by the court below to the FCC's decision, Western Union does not present a question worthy of this Court's certiorari jurisdiction, let alone one that is suitable for the summary disposition suggested in the petition.

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[9] Indeed, the close interrelationship between Bell System tariffs and the contractual issue decided by the FCC brings this case within the line of authority deferring to administrative agency expertise in interpreting and applying tariffs. *See, e.g.*, Indiana Harbor Belt Railroad Co. v. United States, 510 F.2d 644 (7th Cir.), *cert. denied*, 422 U.S. 1042 (1975).

CONCLUSION

For the reasons stated herein, Western Union's petition should be denied.

Respectfully submitted,

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